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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.721 OF 2005
IN
CRIMINAL APPEAL NO.104 OF 2005

Nizamuddin Abdul Kadar Sayyed ... Appellant

Vs.

State of Maharashtra ... Respondent

Mr. Yug Mohit Chaudhari for the appellant.

Ms. Usha V. Kejariwal, A.P.P. for the State.

CORAM: SMT. RANJANA DESAI &
ANOOP V. MOHTA, JJ.

DATED: 10TH OCTOBER 2005.

P.C.:-

1. The appellant was tried in Sessions Case No.827 of 2002 in the Court of Sessions at Bombay for offences punishable under section 302 read with section 34 of the Indian Penal Code (for short, "IPC"). The appellant was tried along with two other accused. The appellant is original accused 2. By the impugned judgment, the learned Sessions Judge convicted the appellant along with other accused for offences punishable under section 302 read with section 34 of the IPC and sentenced him to suffer R.I. for life. The appeal filed by the appellant has been admitted. Today, we are considering the bail application.

2. We have heard, at considerable length, the learned

counsel appearing for the appellant. He submitted that the incident in question took place at about 12.00 O' clock in the afternoon at the Gateway of India. The learned counsel further submitted that judicial notice can be taken of the fact that this place is extremely crowded and, therefore, the claim of the eye-witnesses that they had seen the incident deserves to be discarded. He submitted that PW-8 and PW-1, who are the eye-witnesses have given contradictory versions. They claim to be together. But, PW-8 says that he had seen the incident from a distance of 150 feet whereas PW-1 says that he saw the incident from a distance of about 10 to 15 feet. The learned counsel urged that this itself indicates that both these witnesses are not telling the truth. The learned counsel then urged that PW-1 has come out with entirely a new case in his evidence. He has stated that when he went to the spot, the deceased attacked him with a knife and he averted the attack with his bag and his bag was slashed by the knife. This story is absent in the FIR lodged by PW-1 and significantly the other eye-witness PW-8 does not support this. Therefore, PW-1 is not telling the truth. He further stated that the chemical analyser's report is produced in the court behind the back of the accused. It was not put to the accused in his statement recorded under section 313 of the Criminal Procedure Code (for short, "the Code") and, therefore, he was severally prejudiced. The accused could have offered explanation for this circumstances. The learned counsel further pointed out that, according

to the prosecution, on the clothes of the appellant blood stains were found. Though the blood group of the blood stains tallies with that of the deceased, the co-accused also has the same blood group. Therefore, this circumstance does not help the prosecution.

3. None of the submissions of the learned counsel impress us. The incident in question had taken place in the afternoon at the Gateway of India. It is true that this place is crowded. That does not mean that PW-1 and PW-8 could not have seen the incident because it was a crowded place. It may be that there is some discrepancy in the evidence of PW-1 and PW-8 so far as the distance is concerned, but that by itself would not establish that they are not trustworthy witnesses if their evidence otherwise corroborates each other. We find that the evidence of these witnesses prima facie has a ring of truth. We are informed by the learned A.P.P. that the FIR is lodged shortly after the incident in question. In the FIR, the name of accused 2 is found. PW-1 and PW-8 have assigned specific role to him. Accused 2 was arrested on the same day immediately after the incident near the scene of offence with the blood stained knife in his hand. The blood stains are of the same blood group as that of the deceased. It may be that the chemical analyser's report was not put to the accused in his statement recorded under section 313 of the Code. But, the effect of it will be considered at the final hearing of the appeal. In our opinion, the material, which we

have discussed above, is prima facie sufficient to indicate the involvement of accused 2 in the incident in question. We are told that the deceased survived for about 8 days after the incident. The learned counsel contended that therefore, at any rate, the case under section 302 is not made out. According to the learned counsel, if the accused survives for considerable period after the attack then, the case may not fall under section 302 of the IPC but, may fall under section 304 Part I or Part II of the IPC. In our opinion, each case will have to be decided considering it's peculiar facts and circumstances. In the facts and circumstances of the case, we are not inclined to hold, at this stage, that the appellant's case would be covered by section 304 Part I or Part II of the IPC. The appellant was not on bail in the trial court. We are not inclined to grant him bail. Application is rejected.

(SMT. RANJANA DESAI, J.)

(ANOOP V. MOHTA, J.)